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IN THE

Supreme Court of the United States

October Term, 1966

No. 636

EMPIRE RAYON YARN CO., INC.,

Petitioner,

against

AMERICAN VISCOSE CORPORATION, FRED MALINA, ARTHUR MALINA, EDYTHE M. CHARNAS and FRED H. DIAMOND, co-partners doing business as MALINA COMPANY, GUTNER BROTHERS CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit, dated and entered in this case on July 18, 1966.

Opinions Below

The opinion of the United States District Court for the Southern District of New York, Thomas F. Murphy, D. J., is reported at 238 F. Supp. 556, and appears at pages 4a-11a of Plaintiff-Appellant's Appendix filed below and submitted herewith.

The majority and dissenting opinions of the Court of Appeals are reported at 354 F.2d 182 and appear at pages 19 to 41, *infra*.

The opinion on rehearing *in banc* by the Court of Appeals appears in 1966 Trade Cases (C. C. H.) ¶71,841, but is not yet officially reported; it appears at pages 85a-88a of the certified transcript and pages 42 to 45, *infra*.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on July 18, 1966 (p. 46, *infra*).

Petition for rehearing *in banc* was granted on March 31, 1966 (Cert. Transcript, pp. 81a-84a).

Jurisdiction of this Court is invoked under the provisions of 15 U. S. C. 13 and 28 U. S. C. 1254.

Questions Presented

1. Does a payment, made post-sale and in connection with a post-sale event (e.g. resale), by a seller to selected buyers, offend §2(c), (d) or (e), if it is not within the ex-

ceptions of those sections, or is it *only* the effectuation of a lower price to such buyers, to be judged *only* under §2(a)?

2. Is a payment by a seller to selected buyers upon and because of a specified type of resale a payment for services by said buyers to the seller?

3. If it is, is it for "services rendered in connection with the sale" to said buyers, within the meaning of §2(c), without attached obligation to make the payment or consideration for such services available to all other customers competing in the distribution of the products?

4. Or, is it for "services or facilities furnished * * * in connection with the * * * handling, sale, or offering for sale" by said buyers, within the meaning of §2(d), with such attached obligation?

5. Or, is it a "facilit(y) connected with the * * * handling, sale, or offering for sale" by said buyers, extended by the seller to them, within the meaning of §2(e), with attached obligation to make the facility available to all other customers of the seller?

The Statute Involved

The statute involved is the Clayton Act (Clayton Anti-Trust Act of October 15, 1914, 38 Stat. 730) as amended by the Robinson-Patman Act (of June 19, 1936, 49 Stat. 1526), specifically §§2, 4 and 16 of the Clayton Act, 15 U. S. C. 13, 15 and 26. The pertinent text appears at pages 48 to 51, *infra*.

Statement

Plaintiff sued for damages and injunction (pp. 25-26, *infra*). Originally, it sued under "a", "c", "d" and "e" of §2, but thereafter withdrew its claim under "a" (P.A.* 5a). Originally, Shawmut, Inc. was included among the defendants, but thereafter it was settled with and the action was dismissed as against it (P.A. 2a); the action was continued as against the other three.

At all pertinent times, American was a prominent manufacturer of viscose rayon yarns (P.A. 36a), in active competition with the viscose rayon yarns of other yarn manufacturers (¶¶2, 9, 11 on P.A. 19a-20a). It sold to plaintiff, to defendants Malina, Gutner and Shawmut and to others throughout the United States (¶¶8, 16, 18, 19, 20, 25, 26 on P.A. 20a-22a; ¶3 on P.A. 29a; P.A. 36a, 46a, 52a). Its yarn was traded widely under the name "Avisco" (¶13 on P.A. 21a) and resold by plaintiff, Malina, Gutner and Shawmut under that name (¶13 on P.A. 21a; P.A. 36a).

There can be no claim or question of differing prices or price discrimination because, by express stipulation, American conducted a universal one-price system and its price to all was the same; the parties stipulated as fact (D.A.** 20a, 22a-23a):

> "26. All first quality viscose rayon yarn sales by American, whether to jobbers or to the textile trade directly, have been made at American's established list price.
>
> "36. Plaintiff paid to American the prices set forth in American's published price list as did all

* Appellant's appendix is referred to herein as "(P.A. —a)".

** Appellees' appendix is referred to herein as "(D.A. —a)".

other purchasers from American, including defendants Malina, Gutner and Shawmut."

On May 19, 1949 and June 2, 1949, American entered into an identical contract with respectively Malina and Gutner and on December 30, 1953 it entered into the same contract with Shawmut (P.A. 37a; ¶28 on D.A. 21a). The contract is set forth at P.A. 39a-45a and, since it was made with them, Malina and Gutner received a payment of 5% of their purchase prices if and when they resold (P.A. 52a-53a).

Under the contract, Malina and Gutner must resell in a Fair Trade state "at the same price and on the same terms and conditions as are set forth in (American's) published List Price and sales contract in effect on the date of acceptance of the order from (Malina's or Gutner's) customer" (Art. III). To get the 5%, the resale had to be of the yarn "in its original form" and it was to be paid after and because of such resale (Arts. IV and VI).

The profit to Malina or Gutner would therefore be not merely the 5% but the 5%, plus or minus the difference between list price at purchase and list price on resale.

Plaintiff, like Malina and Gutner, is in the yarn business (P.A. 34a-35a). It compares in size and market with Malina and Gutner (P.A. 35a). It is a competitor of said two and, until refusal of like treatment (P.A. 36a-38a) and consequent discontinuance of purchases in order to bring this suit (P.A. 38a), it competed with them "in the distribution of such products or commodities". It bought and sold American's unprocessed viscose rayon yarn from sometime

prior to 1950 until such refusal (P.A. 36a). It performed throughout the jobber services mentioned in the contract recitals (P.A. 38a). Since 1934, it was engaged in the business of selling to manufacturers located throughout the United States viscose rayon yarn of major producers (P.A. 34a). Part of its selling was in the condition and "original form" in which the yarn was received from the yarn manufacturers and part of yarn which had been subjected to processing or conversion treatment (¶5 on P.A. 20a; P.A. 34a). Malina and Gutner were engaged in the same business, except that Gutner did no processing and dealt with only American's yarns (P.A. 34a-35a). Plaintiff, Malina and Gutner sold to the same trade and manufacturing customers and throughout the United States (P.A. 35a).

In the District Court, defendants were granted summary judgment and plaintiff's cross-motion was denied (P.A. 2a). That Court's opinion (P.A. 4a-11a) found that Malina and Gutner rendered compensable services to American by reselling their theretofore purchased yarn at American's list price and that therefore the 5% was excepted from 2(c) by its "for services rendered" clause. Discussing 2(d), it concluded, inconsistently it is to be observed, that "American pays no money as compensation for services or facilities furnished by the jobber defendants" (P.A. 11a).

Reaching 2(e), the opinion declares that plaintiff's claim (that the 5% is a facility provided to Malina and Gutner in connection with their "handling, selling or offering for sale" of the commodities purchased from

American) is contrary to fact, that "American furnishes no services or facilities to the jobber defendants" (P.A. 11a).

On January 26, 1965, plaintiff appealed (P.A. 2a). On December 13, 1965, the Court panel rendered a majority opinion by Hays, C. J., and a dissenting opinion by Moore, C. J. (pp. 19-41, *infra*) and, reversing, remanded with directions to enter summary judgment for plaintiff. Rehearing *in banc* was ordered on March 31, 1966 and, after submission of further briefs, the Court, *sua sponte*, invited the Federal Trade Commission "to submit a brief *amicus curiae*" and the parties to submit briefs in response. On July 18, 1966, the Court, *in banc*, in an opinion by Moore, C. J. (pp. 42-45, *infra*), vacated its prior reversal, adopted "the statutory interpretation set forth in the dissenting opinion" and ordered affirmance.

Basis for Federal Jurisdiction in the Court of First Instance

The action being under the Clayton Act, §§2, 4 and 16, 15 U. S. C. 13, 15 and 26, the basis for federal jurisdiction in the United States District Court for the Southern District of New York is 15 U. S. C. 15 and 22 and 28 U. S. C. 1337.

Reasons for Granting the Writ

1. The opinion of the Court below as to the interpretation and application of §2(a), (c), (d), (e) of the Clayton Act, 15 U. S. C. 13(a), (c), (d), (e), raises an important question of federal law which has not been, but should be, settled by this Court.

The opinion *in banc* mentions "the importance of the issue involved" (p. 43, *infra*). The issue takes on added importance because of its significance for what has been called "an important Act of Congress" (*FTC* v. *Simplicity Pattern Co., Inc.*, 360 U. S. 55, 58 [1959]). The division in the original panel, the determination to rehear *in banc*, the receipt of additional briefs from the parties, the invitation to the Commission, the division in the Commission (p. 44n, *infra*), the receipt of further briefs from the parties and the vacation of the panel decision, all also bespeak the importance of the question, which has not been but should be settled by this Court.

A. §2(a) is not plaintiff's recourse and, in any event, not its exclusive recourse.

This Court, in *FTC* v. *Broch*, 363 U. S. 166 (1960), at pages 170-71, pointed out that §2(c) may be violated, whether or not §2(a) is also. The Court below ruled "that if plaintiff has any grievance, it must find its remedy under Section 2(a) and not as here under Sections 2(c), (d) and (e)" (p. 45, *infra*), this essentially because it found the payments by American to Malina and Gutner to be functional discounts, i.e. a case of differing prices. Assuming that the payments may be so viewed, they are still post-sale rewards which for impressive reasons, impelling the

enactment of §2(c), (d) and (e), must be viewed as forbidden by those subsections ("B" following).

§2(a) deals with differing prices (*FTC* v. *Anheuser-Busch,* 363 U. S. 536, 549-50 [1960]), but here, by stipulation (pp. 4-5, *supra*), there were no differing prices. The contract calls the payments "functional discount" (P.A. 42a-45a), but functional discounts are the differences between differing prices coordinated to the distributive hierarchy of buyers (Rowe, *Price Discrimination under the Robinson-Patman Act,* pp. 174, et seq.) and the payments here have no relation to distributive status, are made on only an if, as and when basis (i.e. if, as and when resales in original form and at American's current list prices are made) and are therefore a negation of buyer classification. Any buyer, regardless of his distributive character, could meet the conditions and, on doing so, should get the same payments.

In concluding that the payments were functional discounts, the FTC declared that "the 5% * * * was a reduction of the price to them granted when they resold the yarn * * *", but all payments in violation of §2(c), (d) and (e) may be viewed as "disguised price adjustments" and yet violate those subsections (*American News Company* v. *FTC,* 300 F.2d 104, 109 [C.A. 2d, 1962]). If this were not so, those subsections would be judicially voided. Any rebate can be rationalized as a price adjustment or difference (e.g., *Oliver Bros.* v. *FTC,* 102 F.2d 763, 765, 769 [C.A. 4th, 1939]).

In *FTC* v. *Simplicity Pattern, supra* (360 U. S. 55, 67) and *FTC* v. *Broch, supra* (363 U. S. 166, 177), this Court ruled that §2(c), (d) and (e) were enacted for a Congressionally approved purpose and are quite viable. Respond-

ents argued otherwise: "We need not and do not argue that §2(c) is a dead letter (although it has not been invoked by the FTC since *Central Grocers**)" and in a supporting footnote said: "The FTC's last 2(c) complaint (*Garret-Holmes & Co.*, Dkt. 8564) issued in March, 1963."

B. §2(c), (d) and (e) are precisely plaintiff's proper recourse.

Post-sale payments are the specific target of those subsections (*Biddle* v. *FTC*, 96 F.2d 687, 692, 693 [C.A. 2d, 1938], cert. den. 305 U. S. 634; H. R. Rep. No. 2966, 84th Congress, 2d Sess. 97-8 [1956]; Patman's *The Robinson-Patman Act*, at pp. 104-5). "* * * Congress could very well have felt that sellers would be forced to confine their discriminatory practices to price differentials, where they could be more readily detected * * *" (*FTC* v. *Simplicity Pattern, supra* [360 U. S. 55, 68]).

Respondents argued below that only " 'hard-core' cases of illicit, unfair, anticompetitive advantages granted to, or coerced by, favored customers" were to be banned by those subsections but, while such knavery may have induced their enactment, every contrivance concealing price difference is, by their plain language, their target. Otherwise, every §2(c) case would involve a wrestling with the inevitable rationalizations and an impossible appraising of the depth or shallowness of involved trickery.

"Purpose and effect", referred to in the dissenting opinion (pp. 33-37, *infra*), now adopted as the opinion of

* *Central Retailer-Owned Grocers* v. *FTC*, 319 F. 2d 410 (C.A. 7th, 1963).

the Court below (p. 44, *infra*), has been applied to differing prices, to determine whether lower prices disguise favors in violation of §2(c) (e.g. *FTC* v. *Broch & Co., supra* [363 U. S. 166]; *Central Retailer, supra* [319 F.2d 410]; *Edward Joseph Hruby,* 61 FTC 1437 [1962]; *Main Fish Co.,* 53 FTC 88 [1956]; *Robinson* v. *Stanley Home Prods., Inc.,* 272 F.2d 601 [C.A. 1st, 1959]; *Thomasville Chair Co.* v. *FTC,* 306 F.2d 541 [C.A. 5th, 1962]; *FTC* v. *Washington Fish & Oyster Company,* 282 F.2d 595 [C.A. 9th, 1960]). Whether lower prices conceal "any allowance or discount in lieu thereof" banned by §2(c) has been determined by that test.

Whether, on the other hand, post-sale payments or favors by seller to selected buyers, criticized under §2(c), (d) or (e), are in reality only lower prices for §2(a) has never, so far as our research discloses, been determined by "purpose and effect", never until this case. Two of the periodical authorities, cited by the dissenting opinion, thought that price differences should never be exposed to 2(c) attack, not even with the "purpose and effect" test, and that cases of equal prices and post-sale payments should, always and unconditionally, be the subject of 2(c). Thus, 38 N. Y. U. L. R. 768 (1963), cited in the dissent (pp. 34, 36, 37, *infra*), says at page 778 (emphasis in original):

> "Strong support for this course exists in the legislative history of the Robinson-Patman Act. Section 2(a) was constructed to prohibit direct and indirect *price* discrimination. Section 2(c) was designed to reach those practices wherein buyers bought at the same price as did their competitors, but secured discriminatory advantages through concealed brokerage

payments or rebates. The section's purpose was to force hidden price discriminations out into the open where they could be subjected to the terms of section 2(a)."

And 51 Calif. L. R. 215 (1963), cited in the dissent (pp. 34, 37, *infra*), says at page 219:

"So long as * * * discounts are open reductions in the price itself and not concealed collateral payments to buyers, there is no apparent reason why this situation should be treated differently from any section 2(a) price discrimination case."

It is apparent, that "purpose and effect" has been misapplied, so that now concealed private collateral payments may be rationalized into an all-encompassing §2(a), along with true differing prices, although the elimination of the former is exactly the Congressional intent in enacting §2(c) and banning them is not succumbing to form but rather recognizing substance impregnated with firm Congressional determination.

Whether the 5% is brokerage or in lieu of brokerage is irrelevant, although respondents in the District Court defended it as brokerage because, despite the fact that Malina and Gutner bought and took title and themselves resold, they brought their supplier American and their purchasers together (P.A. 32a-33a) and the District Court agreed (P.A. 7a-9a). §2(c) does not refer to only brokerage "or any allowance or discount in lieu thereof"; it forbids the payment of "*anything of value as * * * compensation*". This Court, in *Broch* (footnote 6), shows "that §2(c) was intended to proscribe other practices" as

well. Non-brokerage payments of one kind or another were found banned by §2(c) in *Rangen, Inc.* v. *Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (C.A. 9th, 1965); *Fitch* v. *Kentucky-Tennessee Light & Power Company*, 136 F.2d 12 (C.C. 6th, 1943); *Pittsburgh Plate Glass* v. *Jarrett*, 131 F.2d 674, 676 (C.C. 9th, 1942); *Allgair* v. *Glenmore*, 91 F. Supp. 93 (D.C.S.D.N.Y., 1950); *Interborough* v. *Curtis*, 10 F. R. D. 330 (D.C.S.D.N.Y., 1950) and *Baysoy* v. *Jessop*, 90 F. Supp. 303 (D.C. Pa., 1950). In *Central Retailer, supra*, which found inapplicability of §2(c) for its facts, the Seventh Circuit, by its footnote 3 (p. 413 of 319 F.2d), indicated that any kind of post-price rebate by seller to buyer would be §2(c)-banned.

That Malina and Gutner rendered no services to American is apparent. The panel majority opinion in the Court below makes this clear (pp. 26-28, *infra*). But, in any event, re-selling is not a service in connection with the original sale by American to Malina and Gutner and therefore not within the "except for services rendered" clause of §2(c) (ROWE, *op. cit., supra*, pp. 347-49, 376-81). The FTC, arguing that "the 5% * * * was a reduction of the price" (p. 9, *supra*), said that it "was not compensation * * * for services rendered to American in connection with the sale by it of its goods."

Effect on competition is not relevant in a 2(c), (d), (e) case (*FTC* v. *Simplicity Pattern Co., Inc., supra* [360 U. S. 55, 65-6]). Nevertheless, the statment of the dissenting opinion below that allowing plaintiff to prevail would "deprive(e) small buyers of a source of supply" or subject them to too high a price (p. 37, *infra*) will be noted; yet, giving all buyers an equal opportunity to meet the if,

as and when conditions of the 5% would, if anything, broaden for the small buyers the "source of supply". On the other hand, plaintiff is a competitor of Malina and Gutner (pp. 5-6, *supra*) and, as such, was required to provide American's "Avisco" yarn, processed and unprocessed, and at the same prices as Malina and Gutner and, to do so, had to absorb the 5% in the resale of the unprocessed yarn, i.e., American's yarn "in its original form", or curtail its sales "in original form" and lose business in both processed and unprocessed yarn (P.A. 39a). If knavery were component of a §2(c), (d) or (e) offense, which it is not (p. 10, *supra*), the component is present.

C. If §2(c) is not applicable, §§2(d) and 2(e) are.

The 5% is not a functional discount (p. 9, *supra*). It is not for services rendered to the supplier American (p. 13, *supra*). If, withal, it is, then it is for services rendered in connection with resale (P.A. 52a-53a) and, as such, is a compensation which under §2(d) must be made "available on proportionally equal terms to all other customers competing in the distribution" (Rowe, *op. cit., supra*, pp. 347-49, 376-81). Plaintiff is such a competitor (pp. 5-6, *supra*), but was denied.

In another view, the 5% enables or facilitates the desired type of resale and is therefore a "facilit(y)" provided by seller to buyer in connection with such resale and therefore also must be made available to all others "on proportionally equal terms", within the meaning of §2(e).

However viewed, since the 5% is not a functional discount effecting a §2(a) lower price, it is either for no

services, thus offending §2(c), or is unavoidably within §2(d) or §2(e).

The panel majority did not reach the question (p. 31, *infra*). The dissent did not mention §2(d) or (e). The opinion *in banc* briefly excluded "d" and "e" (p. 45, *infra*), essentially because of its conclusion that the 5% was a functional discount.

D. No superiority of defendants' system over functional discounts justifies it or confines plaintiff to §2(a).

Below, respondents argued that buyers' resales as jobbers are better policed by defendants' method. Both Malina and plaintiff are of dual function, each being a jobber and processor (p. 6, *supra*); for such a buyer, a higher price for yarn to be processed and a lower price for yarn to be jobbed is the recognized method (e.g., *Champion Spark Plug Co.*, 50 FTC 30 [1953]). Gutner is of single function, is only a jobber (p. 6, *supra*), and a straight lower price for it is the recognized method. Required resales in only Fair Trade states would insure resale prices. It may be that defendants' method is better than functional discounts. If their method were self-executing or if, with their method, there were better assurances of seller-policing of resales, which may be doubted, it would be better. But, then, §2(a) would still not be applicable and §2(c), (d) and (e) would mandate equality of treatment of all buyers (*Broch, supra* [363 U. S. at page 176], for §2[c]; p. 14 *supra* for §2[d] and §2[e]).

2. The decision herein is not in accord with the applicable decisions of this Court.

(a) In the *Broch* case, this Court ruled that §2(c) (and therefore also §2[d] and [e]) may be violated though §2(a) may or may not also be violated (p. 8, *supra*). The decision below rules that plaintiff's only recourse is under §2(a), to the exclusion of §2(c), (d), (e). The result is that a perspective, prohibited by stipulation of fact (pp. 4-5, *supra*), making §2(a) applicable, is permitted to exclude a more tenable perspective making §2(c), (d) and (e) applicable.

(b) This Court, in the *Simplicity Pattern* case (at p. 68 of 360 U. S.), said that private payments to buyers were the specifically intended ban of §2(c) (p. 10, *supra*). But the decision below holds that such payments may *only* be viewed as "bear(ing) all the characteristics of a functional discount, the validity of which should be judged under Section 2(a)" (p. 45, *infra*).

(c) In both *FTC* v. *Simplicity Pattern, supra* (360 U. S. 55, 65-71) and *FTC* v. *Broch, supra* (363 U. S. 166, 170-1), this Court ruled that the defensive provisos of §2(a) are not applicable to an offense under §2(c), (d), (e); in the former, this Court confirmed that the matter was of "fundamental significance * * * in the application of an important Act of Congress" (p. 58 of 360 U. S.). Viewing a post-sale payment as a price reduction, impeachable only under §2(a), has the unavoidable effect of subjecting all §2(c), (d), (e) payments to those defensive provisos.

3. The action of the Court below constituted a delegation of judicial authority to the Federal Trade Commission and calls for an exercise of this Court's power of supervision.

The course of this litigation has been unique. The panel majority ordered reversal and judgment for plaintiff. Rehearing *in banc* followed. New briefs were submitted by the parties on rehearing. Then, the FTC was invited to submit a brief *amicus curiae*. Briefs of the parties, addressed to the *amicus* brief of the FTC, followed.

The views of the FTC, because of its expertise, are undoubtedly entitled to great weight. But the acceptance of the conclusions of the FTC, without dissent, not even from the original panel majority, and a reading of the opinion of Moore, C.J., on rehearing leave one with the impression that the FTC was permitted to decide this case. True, the opinion *in banc* "adopts the statutory interpretation set forth in the dissenting opinion" (p. 44, *infra*) but no discussion of the engrossing factors revolving about the conceded "importance of the issue involved" appears, except for a restatement of the views in the FTC brief, significantly engaging the substantial part of the opinion.

Respectfully, we submit that it is apparent that a commission has been allowed to decide what the parties are entitled to have the courts decide. This criticism we make respectfully and reluctantly and only because we feel impelled to suggest the need for an exercise of this Court's power of supervision.

Conclusion

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinions of the United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 468—September Term, 1964.

(Argued May 4, 1965 Decided December 13, 1965.)

Docket No. 29554

EMPIRE RAYON YARN CO. INC.,
Plaintiff-Appellant,

v.

AMERICAN VISCOSE CORPORATION, FRED MALINA, ARTHUR MALINA, EDYTHE M. CHARNAS and FRED H. DIAMOND, co-partners doing business as MALINA COMPANY, GUTNER BROTHERS CORPORATION,
Defendants-Appellees.

Before:

MOORE, SMITH and HAYS, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Thomas F. Murphy, Judge, 238 F. Supp. 556 (1965), granting defendants' motion and denying plaintiff's cross-motion for summary judgment, in an action brought under §§2(c), (d), (e), 4 and 16 of the Clayton Act, 15 U. S. C. §§13(c), (d), (e), 15 and 26 (1964).

Reversed and remanded with directions.

JACOB GREENWALD, SWEET, REINITZ, PESKIN & SWEET, New York, N. Y., for Appellant.

E. COMPTON TIMBERLAKE, New York, N. Y. (Jackson, Nash, Brophy, Barringer & Brooks, Lawrence P. McGanley, Attorneys for American Viscose Corp.; Silver, Bernstein, Seawell & Kaplan, Nahum A. Bernstein, Attorneys for Malina Co.; Herbert S. Greenberg, Attorney for Gutner Bros. Corp.), for Appellees.

HAYS, Circuit Judge:

The complaint dismissed by the judgment below attacked the validity under the Robinson-Patman Act[1] of defendants' distribution system for rayon yarn. The district court granted summary judgment for the defendants. 238 F. Supp. 556 (S. D. N. Y. 1965). We reverse.

The plaintiff Empire Rayon Yarn Co., Inc. (Empire) buys unprocessed rayon yarn from the manufacturers of such yarn. Part of this yarn it converts, or processes, for use in the textile trade and part it resells in the original package and condition as received from the manufacturers. In this latter capacity Empire functions as a jobber, buying the rayon yarn on its own account, warehousing it at its expense and reselling it to wholesalers, other converters and retailers.

The defendant American Viscose Corporation (American) manufactures and sells unprocessed viscose rayon yarn in interstate commerce under the tradename "AVISCO." As of 1958 American manufactured over thirty-five per cent

1. Clayton Act §§2(c), (d), (e), 49 Stat. 1527 (1936), 15 U. S. C. §§13(c), (d), (e) (1964), quoted in notes 6-8 *infra*.

(35%) of the total production in this country of viscose rayon yarn.

At issue here is the legality of the method of distribution of this yarn established by American. The affidavit of the general sales manager of American stated the fundamentals of that method:

> "Many years ago American established a distribution policy for the sale of viscose rayon yarn by direct sales to consumers of most of the product and sales to two jobbers, the defendants Malina and Gutner, of a small percentage of the product. These two jobbers were able to sell and service smaller units of the textile trade at lower selling costs than American and for that reason American established the jobber relation. These jobbers performed such services as the maintenance of substantial inventories of yarn in their plants as well as in warehouses, maintenance of an experienced selling organization, assumption of all risk of loss and credit, advertising American products, assumption of all risk of price fluctuation and furnishing of technical assistance to users of rayon. For acting as such jobbers American allowed a discount from list price on all viscose rayon yarn resold by the jobbers. On all sales to these jobbers for processing (not for resale) they pay the current price just the same as the plaintiff [Empire] or any other customer."

In order to implement this dual distribution system American contracted with the defendant Malina Company (Malina) on May 19, 1949, and with the defendant Gutner

Brothers Corporation (Gutner Brothers) on June 2, 1949, to act as American's "appointed jobbers."[2] Malina combines the functions of converter and jobber, whereas Gutner Brothers is only a jobber.

The contracts which American signed with Malina and Gutner Brothers are virtually identical. The "Whereas" clauses state that American "desires to avail itself of the services of selected Jobbers in selling [viscose rayon] * * * yarn in its original form to bona fide fabric manufacturers who, either because of their inability to produce in bulk or because of their inadequate credit position, are not supplied directly" by American; and that

> "the Jobber maintains a large inventory of * * * [American's] yarn in its natural form; carries all overhead costs such as rentals, insurance costs, salesmen's commissions, accounting and other general office expenses incident to maintaining its inventory and performing its other functions of creating and maintaining a market, selling and distribution; and assumes both the risks of loss resulting from price fluctuation and the credit risks entailed in the marketing of yarn in its original form * * *"

Malina and Gutner Brothers undertook to function as jobbers which is defined "to consist of the resale of said yarn in original form to bona fide fabric manufacturers, together with the maintenance at the Jobber's expense of adequate stocks, a warehouse and a sales force." The con-

2. American also entered into a third contract with Shawmut, Inc., on December 30, 1953.

tract further stipulates that Malina and Gutner Brothers are not appointed "the agent or legal representative" of American "for any purpose whatsoever." The contract provides that Malina and Gutner Brothers shall resell the yarn at American's published list prices and that yarn shall be resold in Fair Trade states at the list price "in effect on the date of acceptance of the order from the Jobber's customer," plus taxes. Section IV of the contracts provides that "in consideration of the Jobber functions described herein * * * the Jobber shall be allowed a Functional Discount on all graded rayon yarn purchased hereunder and resold by the Jobber in its original form * * * equal to five per cent (5%) of the list price of such yarn at the date of shipment" by American to the Jobber. Section V sets forth certain conditions "in order to avoid any discrimination against other customers [of American] * * * or against customers of the Jobber through the granting or receiving of said Functional Discount." It excludes any discount on sales of yarn not resold in the original form or of yarn subsequently processed by the Jobber; sales by the Jobber to customers controlled by the Jobber, its stockholders or employees, unless such resale is bona fide and without price discrimination; sales by the Jobber to other jobbers or to persons other than bona fide fabric manufacturers without American's specific approval; sales of yarn resold and subsequently purchased by the Jobber; and sales of yarn resold by the Jobber in which he retains more than a credit interest. Section VI of the contract requires that the Jobber report monthly on its sales in detail and that he permit American to inspect the Jobber's books and records.

The Functional Discount is credited by American to the Jobber's account, and adjustments are made yearly.

Defendant American sold unprocessed rayon yarn under the terms of this contract to both Malina and Gutner Brothers from 1949 through 1955 in large amounts totalling in value over $17,855,000 and $5,074,000, respectively. To the plaintiff Empire, American sold at list price *without discount* about $62,000 worth of unprocessed rayon yarn from 1953 through the first nine months of 1959. However, Empire during this same period bought from other manufacturers and resold in the original package unprocessed rayon yarn to a value of over $1,600,000.

Empire's president repeatedly asked American for treatment equal to that given Malina and Gutner Brothers and in 1956 American responded by submitting for Empire's approval a contract virtually identical to those accorded Malina and Gutner Brothers; but shortly thereafter American withdrew the offer. American's general sales manager stated that its "officers * * * in the exercise of their own business judgment decided that the volume of yarn sold by the jobbing trade did not, and does not [as of January 1958] * * *, justify the appointment by American of more than three jobbers."[3]

Empire had made demands in 1953 on two other manufacturers of rayon yarn, American Enka Corporation and E. I. du Pont de Nemours, for similar discounts; American Enka Corporation agreed in May or June 1958 (after Empire's complaint was filed) to grant a five per cent (5%)

3. See note 2 *supra*.

discount "for all graded viscose rayon yarn," but du Pont refused. During 1958 and the first nine months of 1959 Empire received about $32,000 in discounts on its purchase of yarn from American Enka Corporation.

Shortly after American's refusal to grant Empire the same discounts provided for American's "appointed Jobbers," Empire brought suit against American, Malina, Gutner Brothers and Shawmut, Inc.,[4] claiming violations of the Robinson-Patman Act, specifically Sections 2(a) (price-discrimination),[5] 2(c) (false brokerage),[6] 2(d) (discriminatory allowances),[7] and 2(e) (discriminatory serv-

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4. Empire dismissed its action as against Shawmut, Inc., without prejudice as to its action against the other defendants in 1963.

5. 49 Stat. 1526 (1936), U. S. C. §13(a) (1964).

6. "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid." 49 Stat. 1527 (1936), 15 U. S. C. §13(c) (1964).

7. "That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available in proportionally equal terms to all other customers competing in the distribution of such products or commodities." 49 Stat. 1527 (1936), 15 U. S. C. §13(d) (1964).

ices),[8] and seeking treble damages and injunctive relief under Sections 4[9] and 16[10] of the Clayton Act.

In 1958 a motion and a cross-motion for summary judgment were made. Both motions were denied by the district court because of the existence of challenged issues of fact. 160 F. Supp. 334 (S. D. N. Y. 1958).

After additional discovery and abandonment of the §2 (a) claim, the present motions and cross-motions for summary judgment were made in 1964.

The district court believed that, although the payments made to Malina and Gutner Brothers come within the scope of the statute as "a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof," they escaped the statutory prohibition because they were made "for services rendered in connection with the sale or purchase of goods, wares or merchandise."[11]

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8. "That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers upon proportionally equal terms." 49 Stat. 1527, 15 U. S. C. §13(e) (1964).

9. 38 Stat. 731 (1914), 15 U. S. C. §15 (1964).

10. 38 Stat. 737 (1914), 15 U. S. C. §26 (1964).

11. The district court's opinion is confusing on this point, because at another place (in the discussion of Sections 2(d) and (e) the court says: "American pays no money as compensation for services or facilities furnished by the jobber defendants. Empire's * * * contention under §2(d) that the discount represents a payment for services * * * is specious." 238 F. Supp. at 560-61.

The court said:

> "In the instant case, viewing the jobber defendants as buyer, such services are rendered. They resell at American's list price. Viewed another way, they bring buyer and seller together for a commission and the fact that they take title in the interim does not detract from the value of this service." 238 F. Supp. 556, 560 (S. D. N. Y. 1965).

Reselling at American's list price is not a service rendered to American, but merely a condition of the buyer's contract of purchase. *If* Malina and Gutner Brothers chose to resell at American's list price they became entitled to a discount. Obviously the resale itself was not a service rendered to American. Quite as clearly the price charged for such resale was no more a service rendered than any other condition of the resale, such as the fact that the buyers were entitled to the discount only on unprocessed yarn.

There is no evidence whatsoever that Malina and Gutner Brothers brought "buyer and seller together." They bought goods from American, kept on hand a stock of these goods, and sold them to the purchasers they found ready to buy. In reselling the goods which they bought from American they were no more acting as brokers than are retailers who buy goods from wholesalers and sell them to consumers. See *Western Fruit Growers Sales Co.* v. *FTC,* 322 F. 2d 67, 68 (9th Cir. 1963), cert. denied, 376 U. S. 907 (1964); *Southgate Brokerage Co.* v. *FTC,* 150 F. 2d 607, 609 (4th Cir. 1945). The retailers do not bring the wholesalers and the consumers together.

The set-up of this industry is quite different from a genuine brokerage. A broker assumes no obligation and runs no risks. Malina and Gutner Brothers purchase the yarn from American. They are required by their contracts with American to maintain "a large inventory of * * * [American's] yarn." They must pay for the storage of their inventory until they have found buyers. If the yarn cannot be sold Malina may choose to process it rather than to pay out more for storage. It runs the risk of loss on the processed yarn. Gutner Brothers may find that they are selling yarn at a loss when they have held it for a long period of time, incurring large warehousing charges. If the yarn does not move promptly Malina and Gutner Brothers may have to seek to persuade American to lower the list price or American may do so of its own accord. In either event Malina and Gutner Brothers may suffer a loss on their inventoried yarn. Malina and Gutner Brothers assume the risk involved in extending credit to the firms to which they sell. That this may be considerable is indicated by the fact that "inadequate credit position" of the firms to which Malina and Gutner Brothers sell is one of the reasons given in the contracts between American and Malina and Gutner Brothers for instituting the method of distribution provided by the contracts. This list of differences between the functions of brokerage and the functions performed by Malina and Gutner Brothers need not be prolonged. It is quite clear that these two firms were not rendering ordinary broker's services to their seller.

It is no answer to Empire's complaint to say that American need not deal with Empire if it chooses not to do so.

Whether or not this is true as a general proposition, it is quite clear in this case that American is excluding Empire from the market solely by means of a price differential which is effected by means of payments forbidden under Section 2(c). Empire can purchase all the yarn it wants from American and can sell it (except where it is fair-traded), for any price it can get. But in practice Empire cannot sell yarn at a competing price because of the discount granted to the other buyers and refused to Empire. The legislative purpose which led to the enactment of Section 2(c) was the elimination of payments which had that result. "Congress in its wisdom phrased §2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination." *FTC* v. *Henry Broch & Co.*, 363 U. S. 166, 169 (1960).

If, as we hold, the discounts granted to Malina and Gutner Brothers are not true brokerage because there is no brokerage relationship, objection may be made that the payments, since they are not called brokerage by the parties, do not come within the scope of Section 2(c) at all. But the impact of Section 2(c), as we read it, is on discounts which are granted in connection with sales brought about by the persons who receive the discounts. The prohibition of the statute is not confined to brokerage but extends also to commissions and, indeed, to "other compensation, or any allowance or discount in lieu thereof." While the discount here involved is a discount from the price charged to the jobbers, it is payable only if and when they have sold

the purchased yarn at a price set by American, and is therefore in an important sense incidental to such sale.

Discrimination in price, as such, is governed by Section 2(a). Where the price discrimination is effected by a discount which is related to a sale by the person receiving the discount (i.e. a commission or brokerage or other similar compensation), Section 2(c) is applicable.

A "functional discount" which is paid, like commissions and brokerage, in connection with such a sale, may be used to mask price discrimination in violation of the legislative purpose of Section 2(c).

"The 'unqualified' prohibition of Section 2(c), legislatively aimed at brokerage devices for the concealment of price discriminations, was designed to force these price differentials 'into the open' for measurement and adjudication under the price discrimination provisions." Rowe, Price Discrimination Under the Robinson-Patman Act 331 (1962), citing *FTC* v. *Simplicity Pattern Co.*, 360 U. S. 55, 68 (1959); *Biddle Purchasing Co.* v. *FTC*, 96 F. 2d 687, 692 (2d Cir.), cert. denied, 305 U. S. 634 (1938); H. R. Rep. No. 2966, 84th Cong., 2d Sess. 97-98 (1956).

Therefore, the payments made to Malina and Gutner Brothers fall within both the language and the legislative intent of Section 2(c). It follows that they are prohibited by that Section.

We are cited to no authority supporting defendants' claim that plaintiff's complaint, because of plaintiff's ar-

rangement with American Enka, is barred by the doctrine of unclean hands, and we find none. Plaintiff's authorities support its position that the doctrine is inapplicable in this kind of case. *American Coop. Serum Ass'n* v. *Anchor Serum Co.*, 153 F. 2d 907, 912 (7th Cir.), cert. denied, 329 U. S. 721 (1946); *O. & W. Thum Co.* v. *Dickinson*, 245 Fed. 609, 622-23 (6th Cir. 1917), cert. denied, 246 U. S. 664 (1918); *Revlon, Inc.* v. *Regal Pharmacy, Inc.*, 29 F. R. D. 169, 177 (E. D. Mich. 1961).

In view of our determination that the payments in question violate Section 2(c), there is no occasion for considering the allegations as to Sections 2(d) and 2(e). See Rowe, *op. cit. supra*, 337-338.

The order granting summary judgment for the defendants is reversed and the case is remanded with directions to ascertain plaintiff's damages and to enter summary judgment for the plaintiff.

MOORE, Circuit Judge (dissenting):

Since the majority concedes that no brokerage relationship existed between American and the jobbers awarded the discounts, the crucial issue raised is whether the legality of the discounts was properly tested under Section 2(c), the brokerage clause. The majority assert without citation of authority that the discounts are within the purview of Section 2(c) since it covers all discounts "which are granted in connection with sales brought about by the persons who receive the discounts." Moreover, they urge that

Congress intended to invalidate payments such as those involved here because Section 2(c) is aimed at brokerage devices utilized to conceal price discrimination. Yet, rather than delineate the "brokerage" aspects of American's discounts, the majority merely assume that such a characterization is appropriate. Finally, the majority, as does Empire, rely in part on a 1945 Fourth Circuit decision, *Southgate Brokerage Co.* v. *FTC*, 150 F. 2d 607 (4th Cir. 1945), where the court held that discounts granted to a distributor who purchased and sold for his own account were unlawful under Section 2(c). However, as Judge Weinfeld noted in his opinion on the first motion in this case, in *Southgate* the applicability of Section 2(c) to the discounts granted was not in issue, i.e., there was no dispute as to whether they constituted an allowance in lieu of brokerage, as the situation is here. *Empire Rayon Yarn Co.* v. *American Viscose Corp.*, 160 F. Supp. 334, 336 n. 5 (S.D.N.Y. 1958). The sole issue in *Southgate* was whether the payments were made "in return for services rendered" to the seller and, thus, excepted from Section 2(c).[1] In view of

1. See also *Western Fruit Growers Sales Co.* v. *FTC*, 322 F. 2d 67, 68 (9th Cir. 1963). Other decisions relied on by Empire are also not controlling here for they involved (a) the admitted receipt of brokerage payments by buyers' agents and raised issues concerning whether the buyers actually controlled the recipients of the payments or whether the payments were justifiably granted "for services rendered" the seller, see *Modern Marketing Service Inc.* v. *FTC*, 149 F. 2d 970 (7th Cir. 1945); *Webb-Crawford Co.* v. *FTC*, 109 F. 2d 268 (5th Cir.), *cert. denied*, 310 U. S. 638 (1940); *Quality Bakers of America* v. *FTC*, 114 F. 2d 393 (1st Cir. 1940); *Oliver Bros.* v. *FTC*, 102 F. 2d 763 (4th Cir. 1939); *Biddle Purchasing Co.* v. *FTC*, 96 F. 2d 687 (2d Cir.), *cert. denied*, 305 U. S. 634 (1938); and (b) payments made directly to a buyer in lieu of illicit brokerage previously paid to his agent. *Great Atlantic & Pacific Tea Co.* v. *FTC*, 106 F. 2d 667 (3d Cir. 1939), *cert. denied*, 308 U. S. 625 (1940).

these analytical deficiencies and recent FTC and court decisions which reject interpretations of Section 2(c) as a rule of *per se* illegality, exemplified by the *Southgate* decision, and which refuse to apply Section 2(c) indiscriminately to any and all price concessions, I find the majority's formalistic application of Section 2(c) to the discounts granted by American completely unjustified.

As early as 1956 the FTC made clear that the applicability of Section 2(c) depends on the circumstances of each case when it refused to apply the section to price concessions admittedly coupled with the elimination of brokerage fees on the ground that the evidence failed to establish a connection between them. See *Main Fish Co.*, 53 F. T. C. 88 (1956). A similar inclination to examine the substance of allegedly invalid price variations was demonstrated by the First Circuit in 1959 when it held that no violation of Section 2(c) occurred where a seller terminated broker services and changed to direct sales at reduced prices. *Robinson* v. *Stanley Home Prods., Inc.*, 272 F. 2d 601 (1st Cir. 1959). The court noted that "the matter covered by section 2(c) is unearned brokerage *per se*, not discrimination * * * If a manufacturer * * * improperly discriminates between customers, section 2(a) will accomplish the purposes of the act." *Id.* at 604. *Cf.* H. R. Rept. No. 2966, 84th Cong., 2d Sess. 97-98 (1956). Both of the above decisions were cited with approval by the Supreme Court in *FTC* v. *Broch & Co.*, 363 U. S. 166, 175-76 n. 18 (1960) where the court held that under appropriate circumstances services rendered to a seller may justify a grant of price concessions. *Id.* at 173. Moreover, the Court pointed out

that the "in lieu of" provision of Section 2(c) is aimed at "outright price reductions based on the partial or total elimination of brokerage services." *Id.* at 169 n. 5. Thus, it is apparent that in adjudging the appropriateness of applying Section 2(c) to particular transactions "the question must be what was the purpose of, or the reason for, the * * * [price variation]." *Robinson* v. *Stanley Home Prods. Inc., supra* at 603. See *In re Whitney & Co.*, 273 F. 2d 211, 215 (9th Cir. 1959); *Thomasville Chair Co.* v. *FTC*, 306 F. 2d 541, 545-46 (5th Cir. 1962), 51 Calif. L. Rev. 215 (1963); Rowe, *Price Discrimination Under the Robinson-Patman Act*, 340-41 (1962).

The above mentioned "purpose and effect" test was applied in two recent decisions, one by the Seventh Circuit, *Central Retailer-Owned Grocers, Inc.* v. *FTC*, 319 F. 2d 410 (7th Cir. 1963), and one by the FTC, *Edward Joseph Hruby*, Trade Reg. Rep. (Transfer Binder, FTC Complaints, Orders, Stipulations 1961-1963) §16225 (1962), wherein Section 2(c) was deemed inapplicable to price discounts granted directly to distributors in consideration of their performance of distribution services. These decisions illustrate well the impropriety of the majority's application of Section 2(c) to the discounts granted by American in the present case and demonstrate "a willingness to discard the subservience to form and nomenclature that dominated past brokerage enforcement." Comment, 38 N. Y. U. L. Rev. 768, 777 (1963); see Rowe, *Price Discrimination Under the Robinson-Patman Act* (1964 Supplement) 69-78 (1964); Comment, 42 N. C. L. Rev. 457 (1964). In *Central*, a co-operative purchasing organization, the members of which

were associations of independent grocers, purchased materials from a supplier and obtained repayment from the members plus a markup to cover its operating costs. It received price concessions from the suppliers which were not granted to brokers selling directly to Central's members. At the end of each year, if any funds had accumulated, Central passed them on to the members in the form of patronage dividends. The court held that the concessions did not violate Section 2(c) because they were not based on savings in brokerage expenses but, rather, were made in consideration of the savings inherent in Central's method of doing business. In particular, the court noted that Central obtained the favorable prices because it assured the suppliers of a steady volume of business; removed credit risks; and eliminated billing expenses by providing a central office for payment. *Central Retailer-Owned Grocers, Inc.* v. *FTC, supra,* at 414. Similarly, the FTC in *Hruby* looked to the distribution services performed by a distributor receiving price discounts to exonerate him from liability under Section 2(c). Commissioner Elman's opinion characterized the price concessions as "functional discounts" which did not pass on brokerage savings to the distributor and stressed the fact that the distributor performed "a legitimate and useful economic function in the channels of distribution" by assuming risks of collection and loss in transit; by servicing small unit purchasers [he took title to the goods and resold them on his own account]; and by maintaining and operating warehouses stocked with substantial quantities of the suppliers' products. *Edward Joseph Hruby, supra,* at 21051-52. The FTC also noted

that the discount enabled the distributor to resell to customers at a profit. *Id.* at 21052.

These decisions demonstrate that a price discount should *not* be treated as "an allowance 'in lieu of' brokerage if it is causally conceived in considerations *other* than a saved commission or fee." Rowe, *supra*, 341 (1962). The reliance by the Seventh Circuit and the FTC on evidence of a distributor's business methods and the resultant advantage to the supplier of gaining entrance to an otherwise impractical market to rebut inferences that discounts were causally related to a reduction in brokerage services is sound, especially in light of the "purpose and effect" test enunciated in *Robinson* v. *Stanley Home Prods., Inc.*, *supra*, and approved by the Supreme Court in *FTC* v. *Broch & Co.*, *supra*. See Comment, 32 Geo. Wash. L. Rev. 663, 669 (1964); *cf.* Rowe, *1964 Supplement*, *supra*, 74-75. See generally 38 N. Y. U. L. Rev. 768 (1963). Moreover, approval of the compensation of a distributor by a supplier for distribution services rendered, in effect constitutes a rejection of *Southgate Brokerage Co.* v. *FTC*, *supra*, and undermines its value as a precedent.[2] See *Edward*

2. This decision and its progeny have not only been criticized for adopting an inflexible construction of Section 2(c), see Rowe, *Price Discrimination Under the Robinson-Patman Act* 357-59 (1962); Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act* 114-16 (1959); Law, *The Performance of Distribution Functions as Legal Justification for Price Differentials Under the Robinson-Patman Act*, 69 Dick. L. Rev. 39 (1964), but also for adopting a construction which is inconsistent with broader antitrust principles in that it granted a legal monopoly to one type of middleman, clogged competition in distribution channels and exacted a tribute "from the consumer for the benefit of a special class." *Att'y Gen. Nat'l Comm. Antitrust Rep.* 191-93 (1955); *Edwards*, *supra* at 151.

Joseph Hruby, supra, at 21054-56 (MacIntyre, Comm., dissenting); 38 N. Y. U. L. Rev., *supra,* at 775-76; Rowe, 1964 Supplement, *supra* 75 n. 56.

Recognition of the vital economic functions performed by distributors reselling to small wholesalers by the courts and the FTC is long overdue. Comment 42 N. C. L. Rev. 457, 465; see Comment 51 Calif. L. Rev. 215, 219 + n. 31 (1963). Edwards, *Price Discrimination,* 150-52 (1959). "The refusal to recognize this distributive function results either in depriving small buyers of a source of supply or in compelling them to pay a higher price than their competitors in buying from a distributor * * * to whom the manufacturer is *forced* to sell at the same price as direct buyers." Austin, *Price Discrimination and the Small Business Man,* in 16 ABA Section of the Antitrust Law 94, 102-03 (1960). Business realities and the necessity for competition in the channels of distribution demonstrate the desirability of assessing the competitive effect of discounts granted to distributors with reference to the less restrictive standards that have developed under Section 2(a), the general price discrimination provision, rather than Section 2(c). See Comment, 42 N. C. L. Rev., *supra* at 465.

The jobbers receiving discounts from American here performed distribution services identical to those referred to in *Central* and *Hruby,* i.e., they assumed credit risks; serviced small unit purchasers; and maintained and operated warehouses storing American's products. In effect, they provided the means by which American was able to reach a market which, in the absence of the services rendered, it would not have been economically feasible to en-

ter. Empire contends that the conditional nature of the discounts, i.e., the fact that they were not granted outright to the jobbers, conclusively demonstrates that they were not granted in consideration of the jobbers' functional utility. However, it should be noted that the resales were made at American's list price at the time of resale so that the jobbers' profit margin was subject to change in accordance with American's price changes. Moreover, the record supports a finding that the jobbers were engaged to service a particular market, to wit, small wholesalers. The mere fact that the discount was granted "after the fact" does not render unreasonable the conclusion that they were granted to provide an incentive and compensation for the performance of a vital economic function.

In sum, the majority's disposition does not comport with the facts and "stretches Section 2(c) * * * far beyond the limits of its language and manifest purpose, to a point where it now threatens to swallow up much of the territory covered by the more general statutory provisions which it was intended to supplement." *Central Retailer-Owned Grocers, Inc.*, Trade Reg. Rep. (FTC Complaints, Orders, Stipulations 1961-63) ¶15896 at 20717 (1962) (Elman, Comm., dissenting). As the majority concede, there is no problem of "dummy" brokerage in this case. Moreover, the discounts do not come within the "in lieu of brokerage" provision of Section 2(c) for they were not demonstrated to be direct price reductions "based on the theory that fewer brokerage services were needed in sales to these particular buyers or that no brokerage services were necessary at all." *FTC* v. *Broch & Co., supra,* at 169 n. 5. As

in *Hruby* and *Central*, the discounts were "proximately caused," i.e., causally related, by the performance of legitimate distribution functions and services.[3]

It is apparent, as Judge Murphy noted below, that Empire's objection to the discounts is in essence a claim of price discrimination which, contrary to the majority, was not effected by "brokerage devices" and is not cognizable under Section 2(c). This is not to say, however, that the price differentials are exempt from scrutiny under Section 2(a). Their legality depends on the criteria governing price discriminations by sellers under Section 2(a) and their receipt by buyers under Section 2(f), i.e., if they are anti-competitive in effect and if the defenses of cost justification or good faith meeting of competition are not estab-

3. The "for services rendered" proviso in §2(c) could have been invoked to dispose of this appeal for *FTC* v. *Broch & Co.*, 363 U. S. 166 (1960) "indicated sympathy with some reassessment of the 'for services rendered' clause," Rowe, *supra* 353 (1962), which many considered a dead letter in view of *Southgate Brokerage Co.* v. *FTC*, 150 F. 2d 607 (4th Cir. 1945), see Rowe, *supra* 350 (1962); Austern, *Section 2(c)*, CCH Robinson-Patman Act Symposium 37 (1946). The discounts here, moreover, could properly be treated as granted "for services rendered" to American. That avenue of analysis, however, has been rejected because it is too circuitous and prevents the inquiry from focusing on the ultimate issue, viz., at what point should §2(a), the general price discrimination provision, yield to §2(c), the brokerage provision? This issue should be resolved by restricting the operation of §2(c) to those payments demonstrated to be causally related to either partial or total elimination of brokerage services, with the caveat that legitimate variations in brokerage fees, i.e., those based on genuine differences in cost, may be passed on in the form of lower prices. *Thomasville Chair Co.* v. *FTC*, 306 F. 2d 541 (5th Cir. 1962); cf. *FTC* v. *Broch & Co.*, *supra*. This rule embodies a frank recognition of the legitimate economic function performed by intermediate distributors and the need for fostering competition in the channels of distribution which is best served by testing discounts under the less restrictive standards of §2(a).

lished, they would be unlawful. However, "where as here the allegations of fact relate only to a §2(c) violation * * * [it would be improper] to read in the possibility that the venture complained of may * * * amount to a §2(a) price discrimination * * *" *Empire Rayon Yarn Co.* v. *American Viscose Corp.*, 238 F. Supp. 556, 560 (S. D. N. Y. 1965).

In final analysis, from the correspondence between the parties and the record, the purpose of this lawsuit is all too clear. By its abandonment of its section 2(a) claim, i.e., price discrimination, Empire impliedly recognized that it did not wish to risk the factual defenses which American might successfully interpose thereunder. Empire's sole purpose was to force itself upon American as a distributor performing the functions of Malina, Gutner Brothers and Shawmut. American, exercising its supposed right (which might well be denominated constitutional) to select its own appointees in this particular field, had advised Empire that as a matter of business judgment "for the present at least this Corporation will not appoint any additional jobbers." Empire then resorted in effect to the *in terrorem* position or threat of—unless you add us as a distributor, we will sue you. Empire's real complaint was a price discrimination, section 2(a), violation which it originally alleged. Unwilling to pursue its action under that section and relying upon the label "5% discount" as bringing it under sections 2(c), (e) and (f), Empire sought to mold the factual situation to the contour of these sections.

The courts should be ever zealous to enforce the laws designed to promote active and healthy competition which,

in theory at least, should redound to the benefit of the public and the various business organizations serving the public. However, the courts should be ever watchful lest under the guise of law enforcement bodies they become the instrumentalities of special interests which seek to use the law and the courts for their own particular benefit. This aspect of the present case was noted by a most discerning judge as appears in his decision upon the original summary judgment motion, wherein he said: "Somewhat anomalously, based upon its assertion that it has the necessary facilities and qualifications to perform for American the jobbing services to the same extent as the jobber defendants, the plaintiff seeks the same discount which, if in fact is discriminatory, would in turn discriminate against other customers of American who might claim to be qualified to be accorded a jobber classification." Weinfeld, *D.J.*, in *Empire Rayon Yarn Co.* v. *American Viscose Corp.*, 160 F. Supp. 334, 336 (S. D. N. Y. 1958).

Because I believe that the decision of the majority is at variance with the purpose of section 2(c), with the facts which govern the relationship between American and its three distributors, with the decisions of the courts and the FTC interpreting this phrase of section 2(c) and with what should be the policy of the courts of not forcing unwanted distributors upon unwilling business organizations, I dissent and would affirm the order appealed from.

—— F. 2d ——

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 468—September Term, 1964.

(Argued May 4, 1965 Decided December 13, 1965.)

(Submited *in banc* to this Court on March 31, 1966 Decided July 18, 1966.)

Docket No. 29554

EMPIRE RAYON YARN CO. INC.,
Plaintiff-Appellant,

v.

AMERICAN VISCOSE CORPORATION, FRED MALINA, ARTHUR MALINA, EDYTHE M. CHARNAS and FRED H. DIAMOND, co-partners doing business as MALINA COMPANY, GUTNER BROTHERS CORPORATION,
Defendants-Appellees.

Before:

LUMBARD, Chief Judge,
WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS, ANDERSON and FEINBERG, Circuit Judges.

Upon rehearing *in banc*, the order granting defendants' motion for summary judgment and denying plaintiff's motion for summary judgment, Thomas F. Murphy, Judge,

238 F. Supp. 556, affirmed. Previous decision reversing said order and remanding for ascertainment of damages, 354 F. 2d 182. Vacated.

JACOB GREENWALD and IRVING SWEET (Sweet, Reinitz, Peskin & Sweet, New York, N. Y.), for appellant.

SIDNEY P. HOWELL, JR. and W. HUBERT PLUMMER (Rogers, Hoge & Hills, New York, N. Y.) and THOMAS W. PETTUS, JR. (Jackson, Nash, Brophy, Barringer & Brooks, New York, N. Y.), for appellee, American Viscose Corporation.

HERBERT S. GREENBERG, New York, N. Y., for appellee, Gutner Brothers Corporation.

SILVER, BERNSTEIN, SEAWELL & KAPLAN, NAHUM A. BERNSTEIN, New York, N. Y., for appellee, Malina Company.

JAMES McI. HENDERSON, General Counsel (J. B. Truly, Assistant General Counsel, Daniel H. Hanscom, Attorney), for the Federal Trade Commission as *amicus curiae*.

MOORE, Circuit Judge:

This opinion supersedes the previous opinion of a panel of this Court wherein that panel reversed an order which had granted defendants' motion for summary judgment and denied plaintiff's cross motion for summary judgment, 354 F. 2d 182 (1965), Moore, C.J., dissenting. Thereafter defendants petitioned for a rehearing *in banc* which by order dated March 31, 1966 was granted, reconsideration to be had on the record and briefs. Because of the importance of the issue involved, the Court, *sua sponte*, requested the Federal Trade Commission "to submit a brief *amicus*

curiae on the issues raised by this case." The Commission filed such brief to which appellants and appellee replied. After due consideration of the briefs filed originally, of the briefs filed in the *in banc* rehearing and of the position taken by the Commission in its *amicus* brief, we unanimously affirm the order granting summary judgment for the defendants and denying the cross motion therefor.

The facts are set forth adequately in the panel opinion, 354 F. 2d 182. Nor need the arguments *pro* and *con* therein stated be repeated. The Court adopts the statutory interpretation set forth in the dissenting opinion, 354 F. 2d, pages 188-192. Brief reference, however, should be made to the views of the Federal Trade Commission, the agency which to a considerable extent is charged with the administration of the Robinson-Patman Act.

The issue, as before, is whether the payment by American of a 5% discount from list price to Malina and Gutmer, which together with Shawmut had been acting for special factual reasons as jobbers for American, was an illegal brokerage payment within the compass of, and in violation of, Section 2(c).

The Commission[1] has taken the position that upon the facts here presented this 5% discount was not "an unlawful 'brokerage' payment, or allowance or discount in lieu thereof, violative of Section 2(c)" and that these facts "preclude[s] a finding that it constituted a violation of Section 2(c)." The Commission noted that Malina and

1. Commissioner McIntyre did not concur in the Commission's position for the reasons set forth in his dissenting opinion in *Edward Joseph Hruby*, 61 F. T. C. 1437, 1449 (1962).

Gutner were not "dummy" brokers; that they were not powerful buyers able to compel because of economic power the payment of discounts in lieu of brokerage; that American did not utilize brokers in selling its rayon yarn; and that Malina and Gutner did not fall into the buying broker category. The Commission further noted that Malina and Gutner took title and resold to small manufacturers; solicited and obtained their own customers; assumed all risks of loss and credit; operated warehouses; maintained inventories; employed selling organizations; advertised; and furnished technical assistance to their customers. The factual conclusion reached by the Commission was that Malina and Gutner were "independent business men who operated as jobbers at a level of distribution between the manufacturers of the yarn and the processor who found it economically difficult to buy direct"; that they "satisfied an economic need by facilitating the movement of American's rayon yarn to the small units in the textile trade"; and that the 5% discount "bears all the characteristics of a functional discount, the validity of which should be judged under Section 2(a)."[2]

Reliance upon Section 2(c) might well, in the Commission's view, "render all functional discounts illegal *per se*" and prevent the recognition of price differentials at non-competing business levels.

It is our conclusion that if plaintiff has any grievance, it must find its remedy under Section 2(a) and not as here under Sections 2(c), (d) and (e).

Affirmed.

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2. Plaintiff has abandoned the §2(a) claim.

Judgment Sought to be Reviewed

UNITED STATE COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of July one thousand nine hundred and sixty-six.

Present:

Hon. J. EDWARD LUMBARD, Chief Judge,
Hon. STERRY R. WATERMAN,
Hon. LEONARD P. MOORE,
Hon. HENRY J. FRIENDLY,
Hon. J. JOSEPH SMITH,
Hon. IRVING R. KAUFMAN,
Hon. PAUL R. HAYS,
Hon. ROBERT P. ANDERSON,
Hon. WILFRED FEINBERG,
Circuit Judges.

EMPIRE RAYON YARN CO., INC.,
Plaintiff-Appellant,

v.

AMERICAN VISCOSE CORPORATION, FRED MALINA, EDYTHE M. CHARNAS and FRED H. DIAMOND, co-partners d/b/a MALINA COMPANY, GUTNER BROTHERS CORPORATION,
Defendants-Appellees,

SHAWMUT, INC.,
Defendant.

Judgment

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York,

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to the appellees.

A. Daniel Fusaro
Clerk

By Vincent A. Carlin
Chief Deputy Clerk

4

Pertinent Text of Statute Involved
(15 U. S. C. 13)

§13. Discrimination in price, services, or facilities—Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly

in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Burden of rebutting prima-facie case of discrimination

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Statute

Payment or acceptance of commission, brokerage or other compensation

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Payment for services or facilities for processing or sale

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Statute

Furnishing services or facilities for processing, handling, etc.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Knowingly inducing or receiving discriminatory price

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 636

EMPIRE RAYON YARN CO., INC.,

Petitioner,

against

AMERICAN VISCOSE CORPORATION, FRED MALINA, ARTHUR MALINA, EDYTHE M. CHARNAS and FRED H. DIAMOND, co-partners doing business as MALINA COMPANY, and GUTNER BROTHERS CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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EMPIRE RAYON YARN CO., INC.,

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent American Viscose Corporation ("American" herein), together with the other respondents above named ("Malina" and "Gutner" herein), pray that the petition for a writ of certiorari filed October 6, 1966* by Empire Rayon Yarn Co., Inc. ("Empire" herein) to review the decision of the United States Court of Appeals for the Second Circuit of July 18, 1966 be denied.

Opinions Below

We add to those opinions cited by petitioner that of the District Court for the Southern District of New York

* Upon application under Rule 34(5), the time to file this brief in opposition was duly extended to December 5, 1966.

(Weinfeld, D.J.) reported at 160 F. Supp. 334 and appearing at pp. 12a-17a of Plaintiff-Appellant's Appendix filed below and submitted to this Court by Petitioner. The opinion on rehearing *in banc* by the Court of Appeals for the Second Circuit has now been reported at 364 F. 2d 491.

Questions Presented

We think the principal questions could be more simply stated than those formulated by petitioner. Thus—

1. Under the stipulated facts in this case, was American's payment or allowance of a 5% discount to Malina and Gutner, computed upon proof of yarn resales at American's list price, violative of Section 2(c) of the Robinson-Patman amendments to the Clayton Act?

2. Was there anything in this arrangement to invoke Sections 2(d) and 2(e) of the Act?

3. Can it be said that the Court of Appeals below improperly delegated its judicial authority to the Federal Trade Commission and, if so, with what consequence to the parties?

Statement

At all times relevant, respondent American was a producer of rayon yarn sold under the name Avisco either directly to textile manufacturers or to selected distributors or jobbers for resale to small converters (D.A. 20a-21a). The yarn is sold* to processors or converters at a list price and to those performing a jobbing function at list price less a five percent discount payable upon proof

* We employ the present tense to maintain continuity in the context of the case. Actually, since the record herein closed some years ago, American has sold all its operating assets and, today, is no longer in the rayon business and has no relationship with any other party hereto.

of resale at list (D.A. 20a-21a; P.A. 42a). Neither American nor, so far as is known, any other producer in this industry has ever employed brokers in distributing yarn.

American's jobber customers (Malina, Gutner and Shawmut) take title to the yarn and assume all marketing risks in connection with yarn resales. They solicit and obtain their own customers, assume risks of loss and credit, operate warehouses, maintain inventories, advertise, employ salesmen and furnish technical assistance to their customers (P.A. 40a-41a). They are, in every sense, independent business men who operate as jobbers at a level of distribution between American, as producer of the yarn, and the smaller converters and processors whom American might not otherwise reach or be able to service economically (P.A. 39a-40a).

Malina and Shawmut, however, actually function at two levels of distribution as both processors and as jobbers. To assure that the jobber's discount would be given only on jobber resales, American devised a system of granting discounts only after the yarn had been resold to insure that dual function customers would gain a discount only on yarn so resold (D.A. 21a; P.A. 42a, 44a). (Gutner served solely as a jobber, doing no processing or converting of its own. However, to insure price uniformity—and to ascertain the legitimacy of the resales—the arrangement was identical.) These arrangements were formalized in written agreements (D.A. 21a).

Petitioner was a processor or converter which occasionally purchased from American and, in 1956, expressed a desire to serve also as an Avisco jobber (D.A. 21a-22a).*

* Although petitioner now claims that Empire had jobbed Avisco yarn (pp. 5-6), the record is far from clear that it had done anything other than purchase and convert American's yarn (D.A. 19a) and, then, in only two years (D.A. 13a).

However, American limited the number of jobbers with which it dealt and, therefore, declined to deal with Empire in that capacity (D.A. 29a). Hence, Empire could not lawfully be granted the five percent discount applicable only to yarn resold to others.

Empire thereupon on December 10, 1956—almost ten years ago—brought suit against American and the jobbers who did receive the discount, alleging violations of Sections 2(a), 2(c), 2(d) and 2(e) of the amended Clayton Act. *The Section 2(a) allegation was later consciously abandoned.* See, *e.g.*, 238 F. Supp. at 558.

The District Court ruled that American's jobbers rendered services within the meaning of Section 2(c) of the Act and that therefore the five percent discount would not constitute false brokerage. The (d) and (e) claims were dismissed out of hand.

A panel of the Court of Appeals by a two-to-one vote reversed the District Court on a holding that, although no brokerage relationship existed between American and the jobbers, the discounts nonetheless violated Section 2(c). Judge Moore in a dissent which was eventually adopted as the unanimous opinion of the Second Circuit upon rehearing *in banc* held that the discounts involved were functional discounts and not brokerage devices or otherwise within Section 2(c). Thus, such price differentials were to be tested, not under the brokerage section of the Act, but solely under Section 2(a) and subject to the defenses thereto, including those of 2(b).

The Federal Trade Commission submitted a brief *amicus curiae* to the Court of Appeals *in banc* which likewise contended that the discounts were functional discounts, not brokerage, and were therefore properly cognizable under Section 2(a) rather than 2(c). As noted, this rationale was ultimately accepted by a unanimous bench,

including both judges of the panel majority who wholly abandoned their prior—and novel—view and voted to affirm the District Court on the rationale of Judge Moore's dissent.

Summary of Argument

1. The ultimate—and unanimous—decision of the Second Circuit *in banc* is in full accord with this Court's views of Section 2(c) as expressed in *Broch* and, earlier, in *Simplicity Pattern*. No ascertainable congressional purpose or policy would be served either by subjecting functional discounts to *per se* condemnation under Section 2(c) or by extending that provision to cover transactions which do not and never did involve some aspect of brokerage or of allowances in lieu thereof.

2. That decision is also comfortably in line with prior decisions in other circuits and does not conflict with any previously adjudicated case either in the courts or before the Federal Trade Commission. There is, therefore, no novel or significant question of federal law or policy presented for resolution by this Court.

3. Just as no aspect of an abuse of brokerage or comparable allowances is presented here, so also the record presents no element of promotional or advertising allowances or services within the conventional ambit of Sections 2(d) and 2(e). No authority and no tenable policy consideration would warrant the application of either or both provisions to the circumstances of this case.

4. The Court below, in securing the views of the Federal Trade Commission as *amicus curiae*, acted well within its discretion in performing its judicial function of reviewing the initial determination of a divided panel.

ARGUMENT

I.

The decision below does not conflict in any way with applicable decisions of this Court.

Although violation of three parts of §2 was alleged, the case has centered on the question of whether, under these facts, §2(c) of the amended Clayton Act was violated. This section makes it unlawful to pay a commission, brokerage or other compensation or any allowance or discount in lieu thereof except for services rendered in connection with the sale or purchase of goods. In the decision sought to be reviewed, the Second Circuit has now unanimously held that §2(c) is not applicable in the absence of any showing that the discount granted here to jobber customers constituted brokerage or payments in lieu thereof.

Nevertheless, petitioner contends that "[w]hether the 5% is brokerage or in lieu of brokerage is irrelevant" (Pet., p. 12) and that, somehow, the decision of the Second Circuit that these facts are indeed relevant does violence to applicable doctrine of this Court as represented, primarily, by *FTC* v. *Henry Broch & Co.*, 363 U. S. 166 (1960) and *FTC* v. *Simplicity Pattern Co., Inc.*, 360 U. S. 55 (1959). We submit that, on the contrary, the Second Circuit followed exactly the guidelines set out in those decisions. In both, the Court commented on the reasons for the passage of 2(c) and, in both, made clear that the provision involves brokerage and abuse of brokerage.

In *Broch*, this Court held that 2(c) was violated when a seller's broker reduced his commission so that the seller

could make a sale to a buyer at a lower price. In the course of the opinion, it explained that §2(c) was enacted to cover the "means by which *brokerage* could be used to effect price discrimination" and was necessary "because §2(a) was not considered adequate to deal with *abuses of the brokerage function*" (pp. 169, 171; emphasis supplied).

As Justice Douglas explained (pp. 168-169):

> "The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. A lengthy investigation revealed that large chain buyers were obtaining competitive advantages in several ways other than direct price concessions and were thus avoiding the impact of the Clayton Act. One of the favorite means of obtaining an indirect price concession was by setting up 'dummy' brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay 'brokerage' to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of §2(c) of the Act. But it was not the only means by which the brokerage function was abused and Congress in its wisdom phrased §2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination."

Previously but similarly, in *Simplicity* the Court, in holding that neither the presence of cost justification nor the absence of competitive injury constitutes a defense to a §2(e) charge, had outlined certain defined evils not covered by §2(a) which necessitated passage of §§2(c), (d) and (e):

> "Comparable competitive advantages were obtained by the large purchasers in several ways other

than direct price concessions. Rebates were induced for 'brokerage fees', even though no brokerage services had been performed. 'Advertising allowances' were paid by the sellers to the large buyers in return for certain promotional services undertaken by the latter. Some sellers furnished special services or facilities to the chain buyers." (p. 69)

Section 2(c) was patently designed to remedy this first evil as was 2(d) for the second and 2(e) for the third. Of course, "direct price concessions" injurious to competition (and not otherwise excused) were—and are—condemned by 2(a).

Section 2(c), in short, was designed to counter any opportunity for the exaction of discriminatory price advantages through the guise of false, sham or dummy brokerage. It is with this background and under these standards that the Second Circuit had to and, ultimately, did judge this case.

Obviously, if a statute is enacted to cover brokerage and its abuses, it is brokerage transactions that are to be tested.* Even so, whether "a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case," *Broch, supra,* at p. 176. As framed by petitioner, therefore, all this case required was a determination of fact—was brokerage in any way involved with the discounts granted to Malina, Shawmut and Gutner?

---

* There is no claim or record of commercial bribery or other economic coercion by Malina, Gutner and Shawmut. Thus, the cases cited by petitioner (Pet. p. 13) to the effect that some evils other than false brokerage may be tested under Section 2(c) are wholly inapplicable. Cf. *Rangen, Inc.* v. *Sterling Nelson & Sons, Inc.*, 351 F. 2d 851 (9th Cir. 1965) cert. den. 383 U. S. 936 (1966); see Bodner and Burrus, *Developments in Antitrust,* 31 ABA Antitrust 101 (1966).

The answer is apparent and beyond contradiction.

American's discounts to its jobbers were ordinary functional discounts and not in any sense brokerage or payments or allowances in lieu of brokerage. Indeed, American had never sold through brokers. Malina (and Shawmut), to some extent, and Gutner, at all times, were legitimate distributors, functioning—and being compensated—as such; they were not in the brokerage business and did not render traditional brokerage services. Nor is there any suggestion in the record of any traditional brokerage role in this industry. Even the majority opinion of the three-judge panel in the Second Circuit which originally held for petitioner found that "[t]he set-up of this industry is quite different from a genuine brokerage" and that "the discounts granted to Malina and Gutner Brothers are not true brokerage because there is no brokerage relationship" (354 F. 2d at 186-7). The Federal Trade Commission, as *amicus curiae*, likewise found no factual basis for assuming that Malina and Gutner were acting either as dummy brokers or buying brokers:

> "In sum, there was no brokerage relation as such between American and Malina and Gutner and there was no *aura* of brokerage surrounding their business dealings derived from industry brokerage practices, past transactions between them, or other business conduct of any of them." (Appendix p. 7A)*

All nine members of the Second Circuit sitting in rehearing *in banc* agreed.

There is, therefore—absent some such "aura of brokerage"— no important or new question concerning the inter-

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*A complete copy of the FTC brief as filed below is included as an Appendix hereto.

pretation or administration of §2(c) in this case. In light of the history and meaning of the statute and the guidelines already set out by this Court, §2(c) simply could not apply to the situation at hand. The factual circumstances of this case show clearly that no aspect of brokerage was ever involved. To reiterate: two district judges, the original three-judge panel of the Second Circuit, all nine members of the Second Circuit upon rehearing *in banc*, and four members of the Federal Trade Commission have already so judged the facts. Yet, this Court is nevertheless now asked to *assess these facts again* to determine whether there was brokerage or something in lieu thereof. So viewed in its proper perspective, this case is certainly not appropriate for review by certiorari.

II.

No novel or important question of federal law is involved which has not been or should be settled by this Court.

Petitioner further argues that the opinion below raises an important question of federal law which should be settled by this Court. Here also petitioner clearly overstates the matter.

The attempt to make this case appear unique by arguing that this is the first case in which a "purpose and effect" test was applied to determine whether an alleged 2(c) violation should in fact have been brought under §2(a) is nothing more than a matter of labelling. To say that a transaction is to be tested by its "purpose and effect" is simply to say that a price concession must somehow be related to *brokerage* if §2(c) is to apply. That this standard—as already formulated by this Court in

Broch—has now been consistently applied and therefore presents no new question of interpretation or administration can be illustrated by the very cases petitioner cites.

For example, the First Circuit in *Robinson* v. *Stanley Home Products*, 272 F. 2d 601 (1959), found no 2(c) violation where, although the seller had terminated brokerage services and also decreased prices, no relationship between the decrease and the former brokerage payments was established. If a price decrease can be related to brokerage, §2(c) applies; otherwise §2(a) is applicable, as always. However, in the words of the Court, there is "no necessity for calling something brokerage that is not" (p. 604). After all, as that court remarked foreshadowing Judge Moore: "The question must be, what was the purpose of, or reason for, the reduction?" (p. 603).

The Seventh Circuit in *Central Retail-Owned Grocers, Inc.* v. *FTC*, 319 F. 2d 410 (1963) set aside an order of the FTC which found a violation of §2(c) because the Commission had not shown that the price concessions involved in that case were received in lieu of brokerage. Central had been set up as a purchasing group for retailer-owned wholesaler grocers. As such, it received discounts and allowances in connection with its purchases. Central made these purchases on its own order and on its own credit, was billed by the suppliers and paid the bills itself. Hence, since a "broker does not purchase for his own account, is not billed by the seller, and does not make payment to the seller" (p. 414), Central, the Court held, got favorable prices not because of brokerage or a saving in brokerage but because of advantages to suppliers inherent in the way it did business, i.e., volume purchasing, shift of credit risks and reduction in billing. Since the price concessions were not rooted in brokerage but given because of the special functions Central served, there was no violation of §2(c).

The Ninth Circuit saw the other side of the coin (in a case not cited by petitioner) and held that a discount, which "serves the same purpose, has the same effect and enjoys no economic justification which entitles it to be distinguished" from an allowance granted in lieu of brokerage, comes within a cease and desist order based on §2(c) "*—but not otherwise.*" *In re Whitney & Company*, 273 F. 2d 211, 215 (1959); emphasis supplied.

The Federal Trade Commission, too, has held that, if a discount was not designed to pass on or cover up a savings in brokerage but was truly a functional discount paid to an intermediate distributor as compensation for legitimate and useful economic functions, there is no violation of §2(c). *Edward Joseph Hruby*, 61 F.T.C. 1437 (1962).* In that case Hruby purchased foodstuffs on his own account from packers and other suppliers and resold to food wholesalers. His suppliers sold to him at a price under that charged on their direct sales to wholesalers. The Commission held that these discounts "have no resemblance whatever to the practices at which Section 2(c) was aimed" (pp. 1447-1448):

> "Hruby is clearly not a 'dummy' broker controlled by a large buyer to whom he passes on phony brokerage payments. Equally clearly, he is not himself a powerful wholesaler or retail chain exacting from his suppliers false brokerage payments, to the competitive disadvantage of his smaller competitors. And, finally, it is clear that the discounts received by Hruby are not granted because on sales to him sellers could dispense with brokerage services regularly required on their sales, thus effecting savings of usual brokerage fees."

* Commissioner MacIntyre dissented in *Hruby* and, adhering to the views there expressed, noted his abstention from the Commission position taken, *amicus*, in this case. See Appendix note 1.

The Commission accordingly found that the lower price "reflects not a saving of brokerage by the seller (for there is none) but, rather, the difference in the functional-competitive level at which Hruby and his wholesaler customers operate." (p. 1449) Therefore, the lower price charged Hruby was not unlawful under §2(c).

To cite yet another example, in *Main Fish Co.*, 53 F.T.C. 88 (1956), the Commission held that the price concessions involved, although coincidental with elimination of brokerage, were not within §2(c) since the evidence showed no connection between the concession and brokerage.

Finally, an apt summary of the law appears in the FTC brief *amicus:*

> "Application of §2(c) to price differences, discounts or allowances has been done only where the circumstances surrounding the lower price, discount or allowance granted to the buyer, such as, for example, the prior dealings of the parties, the brokerage practices followed in the industry, or the selling methods of the supplier, all pointed to the conclusion that the discount or concession in reality constituted the passing on to the buyer of a saving in brokerage or sales commission or a payment in lieu thereof." (Appendix, p. 9A).

The law, in short, is well settled. That Judge Moore happened to refer to "purpose and effect" when assessing the facts of this case involves no new interpretation or permutation and does not present any issue requiring or appropriate for resolution by this Court. It is clear that none of the factual characteristics of a §2(c) violation are here present. Nothing here presented warrants any conclusion but that a functional discount, defensible under §2(a), is all that is involved. That petitioner's primary objective throughout was a discriminatory price

is, however, evident both in its studied abandonment of any §2(a) charge and in the record (D.A. pp. 26a-28a). Indeed, this case is in all respects typical of functional discounting although petitioner, in yet another attempt to becloud the issue, characterizes the discounts here as "post-sale rewards" or "post-sale payments." All buyers from American, in other words, paid the same price. Some, the jobbers, were credited or paid a 5% discount when it had thereafter been determined that, rather than convert or process the yarn, they had in fact jobbed all or some of it. The consequence of this, petitioner asserts, is that there were no *price* concessions granted by American, thus making §2(a) inapplicable and preventing the discounts from being functional.

On both counts, petitioner's claim has no merit. First, arrangements similar to that in question have been tested under §2(a). See, e.g., *P. Sorensen Mfg. Co. Inc.*, 52 F.T.C. 1659 (1955) aff'd 246 F. 2d 687 (D.C. Cir. 1957); *Sherwin-Williams Co., et al.*, 36 F.T.C. 25 (1943). Secondly, the timing of the discount or payment certainly can not change the substance of the transactions involved. Judge Moore held that the "mere fact that the discount was granted 'after the fact' does not render unreasonable the conclusion that they were granted to provide an incentive and compensation for the performance of a vital economic function." 354 F. 2d at 191. The panel majority put no weight whatever on this point. The Federal Trade Commission did not reach this aspect of the case since it concluded the discount was truly conditioned upon the performance of legitimate distributive functions.

In economic effect, it is obvious that jobbers are entitled to, and to survive must receive, a lower price than proces-

sors (consumers). Indeed, Gutner who functions exclusively as a distributor is entirely dependent on functional pricing. This difference in price is a functional discount whether the difference is evident initially or determined at some later time. Since the different uses made of Avisco yarn by the processor/jobbers in this case could be accurately determined with respect to particular yarn lots only after a resale was made, it was only logical to compute the *functional discount* at that point.

The crucial question, in short, remains, not when was payment made or earned, but whether it bore some relation in some manner to brokerage.

III.

Sections 2(d) and (e) are equally unavailing.

Petitioner's renewed claim that §§2(d) and (e) were also—or, perhaps, alternatively—violated is not only inconsistent but so completely untenable as to be specious. This makeweight contention was so treated both by Judge Murphy, 238 F. Supp. at pp. 560-561, and by the Second Circuit, 364 F. 2d at p. 493.* Since, under the facts of this case, American furnished no promotional or advertising services or facilities to its jobbers and paid no money as compensation for such services or facilities furnished by the jobber defendants, neither 2(d) nor 2(e) could be involved. In its petition (pp. 14-15), Empire adds no facts or arguments that could make (d) and (e) applicable. At most, a factual issue is seemingly raised but, with no basis in the record to support petitioner's

* The Second Circuit in its first opinion and the FTC in its brief *amicus* did not even consider the 2(d) and (e) claims.

allegations, there is no more statutory warrant to invoke these provisions than there would be to invoke the Sherman Act without proving a restraint of trade.

IV.

The Court of Appeals did not depart so far from the accepted and usual course of judicial proceedings as to invoke this Court's supervisory powers.

Petitioner alleges that the Second Circuit, having granted a petition for rehearing *in banc* of its 2-to-1 panel decision, overstepped its authority in its *sua sponte* invitation to the FTC to submit a brief *amicus curiae*. In petitioner's view, the subsequent reference to this brief in its unanimous opinion endorsing the views of that agency as expressed in that brief constituted "a delegation of judicial authority to the Federal Trade Commission and calls for an exercise of this Court's power of supervision." (Pet. p. 17)

Judge Moore, writing for the unanimous court held that, "[a]fter due consideration of the briefs filed originally, of the briefs filed in the *in banc* rehearing and of the position taken by the Commission in its *amicus* brief, we unanimously affirm the order granting summary judgment for the defendants" (364 F. 2d at p. 492). The Court thereby adopted expressly the statutory interpretation set out in Judge Moore's dissent from the earlier panel opinion. Even those of the panel majority (Judges Hays and Smith) concurred.

Nothing in that opinion or otherwise indicates that the court below did not decide this case by and for itself. Judge Moore certainly delegated no authority to the Com-

mission in writing his original dissent. That he and the other eight judges acted improperly when sitting *in banc* cannot be assumed. Furthermore, petitioner raised no objection below when the brief *amicus* was requested and filed; indeed and in fact, petitioner's counsel took the opportunity extended by the Court to submit a further brief in answer to the Commission's points but, in his brief, raised no question as to the propriety of the procedure followed.

Thus, petitioner has in no way shown that the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision" under Rule 19(b) of the Supreme Court's Rules. In any event, the crucial question, we submit, is whether the Court below has now promulgated the proper ruling in terms of this case. We further submit that it has and that, therefore, the source of its views are irrelevant.

Conclusion

This case was unique only after the first decision in the Second Circuit. At that juncture, the ruling of the panel majority could fairly be characterized as novel, and even appear to prominent commentators as "startling"*, incongruous**, or as a "set back."***. Surely, that abortive ruling was contrary to the guidelines of this Court, the holdings of at least three other courts of appeal and of the Federal Trade Commission and clearly jeopardized

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* Rowe, 30 ABA Antitrust 15 (1966).

** Austern, *id.* p. 20.

*** Bodner and Burrus, 31 ABA Antitrust 100 (1966).

the accepted business practice of functional discounting, quite apart from foisting an unwanted distributor on American.

The unanimous decision of the Second Circuit Court of Appeals *in banc,* however, returned this case to the main-stream of current case law and prevailing Robinson-Patman theory and policy. That disposition, we submit, is entirely consistent with the understanding, practice and teaching of the Federal Trade Commission, the agency charged with administration of the Act, and with current business practices and economic needs.

Certiorari should be denied.

Respectfully submitted,

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December 2, 1966.

In the United States Court of Appeals for the Second Circuit

No. 29554

EMPIRE RAYON YARN CO. INC., PLAINTIFF-APPELLANT

v.

AMERICAN VISCOSE CORPORATION, FRED MALINA, ARTHUR MALINA, EDYTHE M. CHARNAS AND FRED H. DIAMOND, CO-PARTNERS DOING BUSINESS AS MALINA COMPANY, GUTNER BROTHERS CORPORATION, DEFENDANTS-APPELLEES

BRIEF OF THE FEDERAL TRADE COMMISSION AS *AMICUS CURIAE*

The Federal Trade Commission herewith submits this brief (the position taken herein is without the concurrence of Commissioner MacIntyre)[1] in response to an invitation received April 28, 1966, from the

[1] Commissioner MacIntyre does not concur in the position taken in the Commission's brief since in his view that position is based upon the rationale of *Edward Joseph Hruby*, 61 F.T.C. 1437 (1962). The reasons for his dissent from that position are set forth in full in his dissenting opinion in *Edward Joseph Hruby*, *supra*, at p. 1449.

Commissioner Elman believes that the scope and interrelation of subsections (a) and (c) of Section 2 of the Clayton Act are correctly described in Judge Moore's dissenting opinion.

Court "to submit a brief *amicus curiae* on the issues raised by this case."

STATEMENT OF FACTS

Plaintiff-Appellant, Empire Rayon Yarn Co., Inc., brought suit for treble damages against the American Viscose Corporation, Fred Malina, Arthur Malina, Edythe M. Charnas and Fred H. Diamond, doing business as Malina Company (hereinafter referred to collectively as Malina), Gutner Brothers Corporation, and Shawmut, Inc., alleging violations of Section 2 (a), 2(c), 2(d), and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act. The allegation of price discrimination in violation of Section 2(a) was later abandoned.

The following are understood to be the essential facts underlying the subject action. American Viscose Corporation is a major producer of rayon yarn, the bulk of which it sells directly to manufacturers who convert or process it into fabric or other products for various uses. The balance of American's yarn, consisting of a small percentage of its production, is sold to three jobbers, Malina, Gutner, and Shawmut, who are able to sell to and service smaller manufacturing units of the textile trade more economically than American. For that reason, the jobber relation was established, and contracts governing it executed between the parties. The contracts which American signed with these jobbers were virtually identical and recited that American wished to avail itself of selected jobbers in selling rayon yarn to bona fide fabric manufacturers who, either because of their inability to pro-

duce in bulk or because of their inadequate credit position, were not supplied directly by American. The jobber function of Malina, Gutner, and Shawmut was defined "to consist of the resale of said yarn in original form to bona fide manufacturers, together with the maintenance at the Jobber's expense of adequate stocks, a warehouse and a sales force."

As jobbers, and pursuant to the contract, Malina, Gutner, and Shawmut performed such economic functions as the maintenance of substantial inventories of yarn, maintenance of an experienced selling organization, assumption of all risk of loss and credit, advertising of American products, assumption of all risk of price fluctuation, and furnishing of technical assistance to users of rayon yarn. Upon submission to American of proof that the yarn had been resold in its original condition and in its original package at American's published list price, Malina, Gutner, and Shawmut received a 5% discount from the list price of American as of the date of original shipment to them. Small processors and converters who bought from the foregoing jobbers paid the same list price for yarn as larger concerns who bought direct at list price from American. Gutner acted as a jobber only, and only for American's yarn. Gutner had no other business activity. Malina and Shawmut acted as jobbers and also as processors, but procedures were set up by American to prevent any possible price discrimination between them in the latter capacity and competing processors. On yarn bought from American and used for processing Malina and Shawmut paid the same price to American as all other processors.

Empire purchased rayon yarn from American for manufacturing purposes, and paid list price therefor. Empire, however, also wanted to act as a jobber for American like Malina, Gutner, and Shawmut, and to buy yarn for resale to manufacturers, processors, and converters with a 5% discount from American's list price upon proof of resale at such list price. American refused to sell to Empire as a jobber on such terms giving as a reason that in the exercise of its own business judgment the volume of yarn sold to the jobbing trade did not justify designating any additional jobbers. Empire thereafter commenced this action for treble damages and injunctive relief.

The district court found, 238 F. Supp. 556 (S.D. N.Y. 1965), that Malina and Gutner[2] "rendered services" within the meaning of Section 2(c), and that the 5% discount did not constitute false brokerage in violation of that section. This Court, 354 F. 2d 182 (2d Cir. 1965), with Judge Moore dissenting, reversed the district court's determination concluding that, although no brokerage relation had existed between American and its jobbers, the discounts nevertheless fell within the language and legislative intent of Section 2(c).

ISSUE

Whether the payment by American of the 5% discount from list price to Malina and Gutner, upon

[2] Empire dismissed its action against Shawmut, Inc., in 1963 without prejudice to its action against the other defendants. For this reason the discussion hereafter will be limited to Malina and Gutner.

proof that they had resold the yarn in its original condition at American's list price, was an illegal brokerage payment in violation of Section 2(c).

DISCUSSION

Under the foregoing facts the 5% discount granted by American to Malina and Gutner was not, in our view, an unlawful "brokerage" payment, or allowance or discount in lieu thereof, violative of Section 2(c). Whether there was an unlawful price discrimination inherent in American's allowance of such a discount to Malina and Gutner on rayon yarn resold by them as jobbers was, in our opinion, a question properly to be determined under Section 2(a), which outlaws price discrimination where there is resulting competitive injury.

We believe that a consideration of all the facts surrounding the discount granted Malina and Gutner precludes a finding that it constituted a violation of Section 2(c). The crucial question in every case brought under Section 2(c) is whether the buyer is receiving preferential treatment effected through the payment of "brokerage, or other compensation, or any allowance or discount in lieu thereof." The answer requires the resolution of a question of fact and must be determined on the basis of all the circumstances prevailing in each case. *Federal Trade Commission* v. *Broch*, 363 U.S. 166, 175–176 (1960); In re *Whitney & Co.*, 273 F. 2d 211, 214 (9th Cir. 1959); *Main Fish Co.*, 53 F.T.C. 88 (1956); *Edward Joseph Hruby*, 61 F.T.C. 1437 (1962).

There is no factual basis for assuming in this case that Malina and Gutner were acting as "dummy" brokers to permit the cloaking of a rebate to the buyer, which was one of the chief targets of Section 2(c) when enacted. *S. Rep.* No. 1502, 74th Cong., 2nd Sess., p. 7; *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 69 (1959). Nor, obviously, were Malina and Gutner powerful buyers able to compel through economic power the payment of the discounts by American in lieu of brokerage. *Great Atlantic and Pacific Tea Company* v. *Federal Trade Commission*, 106 F. 2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); *Interborough News Co.* v. *Curtis Publishing Co.*, 10 F.R.D. 330 (D.C. N.Y. 1950). The 5% discount to Malina and Gutner was not allowed in the context of a saving to American of a brokerage fee customarily paid by American to a broker whose services were dispensed with. *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission, supra; Kadiak Fisheries Company*, 57 F.T.C. 107 (1960). Indeed, the record shows American did not utilize any brokers in selling its rayon yarn, but instead marketed its yarn itself direct to fabric manufacturers, converters and processors. The facts do not reveal that either Malina or Gutner ordinarily functioned as a broker and, therefore, there is no suggestion that they fell into the "buying broker" category: *Southgate Brokerage Co.* v. *Federal Trade Commission*, 150 F. 2d 607 (4th Cir. 1945); *Columbia River Packers Ass'n*, 44 F.T.C. 118 (1947). There is, further, no showing in the record that the employment of brokers

by American or its competitors was an industry practice in the sale of the yarn to processors or converters for the manufacture of fabric or other finished products. If such had been the case, and if the discount to Malina and Gutner had been the equivalent of brokerage currently paid by manufacturers of rayon yarn to brokers for sales to processors and converters, it would have been persuasive evidence, although not necessarily conclusive, indicating that the 5% discount was a disguised brokerage payment. See *Federal Trade Commission* v. *Broch, supra,* 363 U.S. 166, note 10, and Commission cases there cited.

In sum, there was no brokerage relation as such between American and Malina and Gutner and there was no *aura* of brokerage surrounding their business dealings derived from industry brokerage practices, past transactions between them, or other business conduct of any of them.

Under these circumstances more positive indications than exist in this case would have to be present, in our opinion, before the 5% discount granted Malina and Gutner could properly be characterized as compensation, or an allowance or discount in lieu of brokerage, within the scope of Section 2(c). Malina and Gutner took title and resold to small manufacturers. They solicited and obtained their own customers, and assumed all risks of loss and credit. They operated warehouses, and maintained substantial inventories of yarn. They employed and maintained substantial selling organizations, advertised American's yarn, and furnished technical assistance to their customers. They appear to have been, in short, under

the facts shown by the record, independent business men who operated as jobbers at a level of distribution between the manufacturer of the yarn and the processor who found it economically difficult to buy direct. They plainly satisfied an economic need by facilitating the movement of American's rayon yarn to the small units in the textile trade. Under these circumstances, the 5% granted to Malina and Gutner bears all the characteristics of a functional discount, the validity of which should be judged under Section 2(a).

One of the chief targets of Section 2(c) was the abuse of the brokerage function.[8] *Federal Trade Commission* v. *Broch, supra,* 363 U.S. at 169. The report of the House Judiciary Committee, H.R. Rep. No. 2287, 74th Cong., 2nd Sess., p. 14, described Section 2(c) as dealing:

> * * * with the abuse of the brokerage function for purposes of oppressive discrimination.

The granting or accepting of "anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof," was made by Congress a *per se* violation without the statutory defenses applicable to price discriminations proscribed by Section 2(a). *Federal Trade Commission* v. *Simpilicity Pattern Co., Inc.,* 360 U.S. 55, 69 (1959); *Oliver Brothers, Inc.* v. *Federal Trade Commission,* 102 F. 2d 763, 766–768 (4th Cir. 1939).

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[8] Another aspect which concerned Congress in enacting Section 2(c) was the preservation of the integrity of the brokerage relation. H.R. Rep. No. 2287, 74th Cong., 2nd Sess., p. 15 (1936). See *Rangen, Inc.* v. *Sterling Nelson & Sons, Inc.,* 351 F. 2d 851, 856 (9th Cir. 1965).

As indicated earlier, Section 2(c) has in fact been applied in many cases to price differences, discounts and allowances. As the Supreme Court stated in *Broch, supra* (363 U.S. 166, note 14):

> If Congress envisaged the evil as the transmission of brokerage commissions to the buyer, then to permit the buyer to get the same thing under 2(a) in another form and name would deprive 2(c) of all substance.

But application of Section 2(c) to price differences, discounts or allowances has been done only where the circumstances surrounding the lower price, discount or allowance granted to the buyer, such as, for example, the prior dealings of the parties, the brokerage practices followed in the industry, or the selling methods of the supplier, all pointed to the conclusion that the discount or concession in reality constituted the passing on to the buyer of a saving in a brokerage or sales commission, or a payment in lieu thereof. See, *e.g., Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission, supra.* As noted, none of the foregoing circumstances appear to be present in this situation.

Furthermore, Section 2(c) applies to a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, paid by the seller or the buyer for services rendered in connection with the original sale or purchase. It does not apply in its terms to the resale by the buyer to a third party. The 5% granted by American to Malina and Gutner was not compensation paid to them for services rendered to American in connection with the sale by it of its goods, but rather was a reduction of the price to them

granted when they resold the yarn to small third party buyers for converting or processing. Yet the decision in this case holds Section 2(c) applicable because the discount was "related" to a resale by Malina and Gutner to *their* customers. Such a holding seems to constitute an unwarranted extension of Section 2(c) beyond its statutory limits.

Finally, by testing the legality of American's 5% discount to Malina and Gutner under Section 2(c), the majority in this case has enunciated a precedent which appears to be equally applicable to all functional discounts, and could render all functional discounts illegal *per se*. Under this interpretation businesses operating at one level in distribution could not lawfully receive lower prices because of a discount, or discount system, than businesses at another distribution level, even though the two levels did not compete, and the price differences resulting from the differing discounts were otherwise without significant anti-competitive effects. Thus, suppliers would be unable to recognize by means of varying discounts the performance of legitimate and distinctive economic functions in the chain of distribution. Such functional prices, as far as we know, have never heretofore been considered to fall within the ambit of Section 2(c) as payments or discounts granted by the seller to the buyer which were absolutely prohibited.

Where so-called functional discounts have had anti-competitive effects they have been challenged by the Commission, as in the case of other price discriminations, as violative of Section 2(a). See, *e.g., Fed-*

eral Trade Commission v. *Ruberoid,* 343 U.S. 470 (1952); *Purolator Products, Inc.* v. *Federal Trade Commission,* 352 F. 2d 874 (7th Cir. 1965); *Mueller Co.* v. *Federal Trade Commission,* 323 F. 2d 44 (7th Cir. 1963), *cert. denied,* 377 U.S. 923 (1964); *E. Edelmann & Company* v. *Federal Trade Commission,* 239 F. 2d 152 (7th Cir. 1956), *cert. denied,* 355 U.S. 941 (1958), *rehear. denied,* 356 U.S. 905; *Thomas Y. Crowell Company,* 52 F.T.C. 919 (1955); *P Sorensen Manufacturing Co., Inc.,* 52 F.T.C. 1659 (1955); *aff'd,* 246 F. 2d 687 (D.C. Cir. 1957); *Champion Spark Plug Co.,* 50 F.T.C. 30 (1953); *General Motors Corp.,* 50 F.T.C. 54 (1953); *Electric Auto-Lite Co.,* 50 F.T.C 73 (1953).

CONCLUSION

In accordance with the foregoing, it is our view, based upon the facts as we understand them, and as set out in this brief, that the discounts involved in this case were properly cognizable under Section 2(a) rather than under Section 2(c) of the Robinson-Patman Act.

Respectfully submitted.

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